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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 60

ABRAM FLAXER, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

DAVID REIN
JOSEPH FORER

FORER & REIN
711 - 14th Street, N. W.
Washington, D. C.

Attorneys for Petitioner

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I. THE FAILURE TO SHOW THE SUBJECT UNDER INQUIRY, PERTINENCY, OR LEGISLATIVE PURPOSE

A. The Subject Under Inquiry

The government contends (Br. 52) that the subject under inquiry before the Subcommittee was "the extent of the Communist Party's infiltration into the union." It is unable, however, to document this assertion by reference to any thing specific said at the Subcommittee hearing or to any evidence at the trial. Instead it relies on "the entire tenor of the questions which the Subcommittee asked petitioner . . ., particularly when viewed in the light of the back-

ground information concerning petitioner and his union which the committee had received prior to subpœnaing him . . ." (Br. 52).

The "entire tenor" of questions cannot, we submit, ever demonstrate a subject under inquiry with the "undisputable clarity" that is required to support a contempt conviction. *Sacher* v. *United States*, 356 U.S. 576. In any event, the hearing at which petitioner appeared had not even a semblance of the "tenor" claimed by the government. At the hearing, the only questions asked about the Union were whether it possessed the information called for by the subpoena, the number of its members, where they were employed, whether the Union had bargaining rights, whether its officers had to sign non-Communist affidavits, how many locals it had in the Veterans Administration, and who were its national officers (R. 42-49). These neutral, random questions do not by any stretch of the imagination convey the "tenor" claimed by the government. Nor is the situation improved by the responses made by the Subcommittee to petitioner's protests that the membership list could serve no legitimate purpose and would be used for blacklisting. These responses were merely a continued, unexplained insistence on production of the list plus the unilluminating observation (R. 48) that the government has a right to know which of its employees belong to a union.

B. Pertinency

Even accepting the government's conjecture of the subject under inquiry, there remains unexplained how the Union's membership list was pertinent to that subject. As we pointed out in our principal brief (pp. 28-29), the theory of the court below that the

Subcommittee wished to check the Union's membership list against "a list of subversives" was an unsupported improvisation. The government, while embracing the court's theory, itself acknowledges that nothing was said either at the hearing or the trial to support it (or for that matter any other theory of pertinency). "It is sufficient," says the government (Br. 53), "if, as the court below indicated, this could reasonably have been the committee's purpose." It is not surprising that the government cites no authority for this view that a "reasonable" speculation can take the place of a showing of actual pertinency. The unbroken rule of this Court has always been that actual pertinency is an essential element of the offense and must be pleaded and proved. See our principal Brief, pp. 19-20.

The government's argument confuses two situations. Even if it were true, for some reason or other, that "it is unimportant that Senator Watkins" did not explain the pertinency of the demand at the Subcommittee hearing (Br. 53), nevertheless, pertinency would still have to be proved at the trial before petitioner could be rightfully convicted. Since it is not even claimed that actual pertinency was proved, it is clear that the conviction can not stand.

C. Legislative Purpose

The government suggests three possible legislative purposes for the Subcommittee's inquiry: (1) The Subcommittee might have been interested in "remedial legislation designed to oust the Communists from positions of control" in the Union (Br. 54); (2) The Subcommittee might have been trying to determine if the Union was a "Communist-front organization"

as defined by the Internal Security Act of 1950 (Br. 42); (3) The Subcommittee might have been trying to do something relevant to the constitutional requirement "that the United States guarantee to every State a republican form of government" (Br. 55).

The first objection to these suggestions is that they are all might-have-beens. There is simply nothing in the record to indicate what the Subcommittee actually wanted the membership list for, excepting the possible inference to be drawn from the Subcommittee's failure to deny the petitioner's protestations that it wanted the list for the non-legislative purpose of blacklisting.[1] The government's hypothesis of three legislative purposes, based on a conjectured subject under inquiry, does not even rise to the level of a "mere semblance of legislative purpose" which "would not justify an inquiry in the face of the Bill of Rights." *Watkins* at 198. The far-fetched nature of the government's reasoning is shown by its reliance, as evidence of a legislative purpose, upon the enactment by Congress in 1954, some three years after the hearing, of legislation denying rights under the National Labor Relations Act to labor organizations found to be "Communist infiltrated" (Br. 50-51). The government adds parenthetically, "The fact that the U.P.W.A. is not covered by the National Labor Relations Act

[1] The government argues (Br. 53) that petitioner's accusation that the list was desired for blacklisting purposes was refuted by the "entire tenor of the Senator's statements". But all that Senator Watkins said in response to the charge was that the Subcommittee wanted the list, and, in the Senator's view, was entitled to get it. This "tenor", if anything, was a confirmation of petitioner's charge rather than a refutation. Significantly, the government points to no specific statement of the Senator which can support its contention even by implication.

does not detract from the fact that the Subcommittee's inquiry into labor unions generally had a valid legislative purpose." But there is no issue here as to the validity of an inquiry into labor unions generally, and the fact that the Subcommittee may have had legislative purposes on other occasions, does not serve to establish a valid legislative purpose at the hearing at which petitioner appeared.

Furthermore, even if the Subcommittee had the supposed purposes, there is no clue—and it is hard to imagine—as to how the list of Union members would serve the purposes. The assumption of the court below that the Subcommittee had a "list of subversives" against which it desired to check the Union's membership roll is as unsupported as it is constitutionally objectionable.[2] Even assuming that the Subcommittee had some kind of a "list," the government fails to make a showing that a checking of the names of Union members against it would substantially forward the conjectured legislative purposes. Clearly, there is no more substantial and legitimate relation between the names of the Union members and the conjectured legislative purposes than there was between the names of the NAACP members

[2] The government takes umbrage at our view (our principal Brief, 29) that the court below assumed the possession by the Subcommittee of a "master list" of subversives. It responds (Br. 53) that the Subcommittee did not necessarily have a "master list" but "certainly had" a collection of names of persons "who, there were at least grounds for believing, were members of the Communist Party," and that it was against this list that the Subcommittee intended to check names. But this does not make the purpose less illegitimate. It shows only that the list would be of very little utility even for this illegitimate purpose.

and the alleged needs of Alabama in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449.[8]

Finally, it is interesting that at least one of the three legislative purposes conjectured by the government is improper. The function of determining what organizations are "Communist-front organizations" is, under the Internal Security Act, entrusted to the Subversive Activities Control Board after an adversary administrative hearing, subject to court review. The Subcommittee obviously did not and could not have the authority to usurp this role by making such determinations upon its own kind of ex parte hearings. As this Court stated in *Quinn* v. *United States*, 349 U.S. 155, 161: "[T]he power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."

II. THE FAILURE TO INFORM PETITIONER OF THE SUBJECT UNDER INQUIRY AND OF THE PERTINENCY OF THE DEMAND

The government does not dispute that the Subcommittee never informed petitioner of the subject under inquiry, and it concedes (Br. 68-69) that the Subcommittee never explained the pertinency of the demanded records to the subject, whatever it was. It argues, however, that the requirement of *Watkins* that a witness be informed of subject and pertinency does not apply because (1) petitioner's objections did not amount to "an adequate raising of the issue of

[8] Unquestionably the rights of the Union members against compulsory disclosure of their affiliation is entitled to the same constitutional protection as was accorded the NAACP membership. See Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 Col. L. Rev. 614, 635-637, 647-649.

lack of pertinency" (Br. 74); (2) pertinency, even though not expressly stated, had "been made to appear with undisputable clarity . . . from the totality of the attendant circumstances, including but not at all limited to the terms of the committee's authorizing resolution" (Br. 75); and (3) "petitioner was well aware of both" the subject of inquiry and the pertinency thereto of the demand (Br. 75).

At to the second of these contentions we need add nothing further to our demonstration that the subject of inquiry and the pertinency of the demand were wholly undefined not only at the Subcommittee hearing, but also at the trial.

The first contention—inadequacy of the form of objection—was dealt with in our principal Brief (pp. 33-38) in terms of the holding below. An additional comment is warranted, however, by the government's curious argument that the petitioner's objection on Fourth Amendment grounds assumed pertinency (Br. 71-72). The fact is that the Fourth Amendment is the precise constitutional provision which justifies a witness in refusing to produce documents in response to a subpoena duces tecum on the ground that the subpoena calls for irrelevant documents and is therefore an unlawful invasion of privacy. *Federal Trade Commission* v. *American Tobacco Company*, 264 U.S. 298. Contrary to the government's position (Br. 74), a witness before a Congressional committee need not state his objections with the exactitude and precision to which a lawyer may be held in a judicial trial *Quinn* v. *United States*, 349 U.S. 155. Yet even if petitioner had been obliged to state his objection in technical terms, he did so when he cited the Fourth Amendment.

The government's third argument makes an assertion of fact, that petitioner knew the subject under inquiry and the pertinency of the demand. This assertion, however, is not supported by any reference to evidence,[4] but merely quotes Judge Prettyman's statement to the same effect (Br. 75). Our principal Brief pointed out (pp. 34-35) that Judge Prettyman's comment is unsupported by either evidence or logic. The government's failure to respond to our observations makes no contribution to a resolution of the issue, which is not what Judge Prettyman said, but whether he was right.

III. PETITIONER'S STANDING TO RAISE ISSUES RELATING TO EVENTS AT THE HEARING

The government argues (Br. 80-84) that petitioner has no standing to complain that the Subcommittee failed to apprise him of the subject under inquiry and the pertinency of its demand, did not have a quorum, and did not order him to produce the documents on the day at issue. This argument rests on the fact that petitioner had not compiled the membership list prior to the hearing, which proves, says the government, that petitioner "had made up his mind not to comply with this portion of the subpœna under any circumstances" (Br. 82). Accordingly, says the government, petitioner may not rely upon the events at the hearing as a defense to the charge of contempt since these were not the "true basis" of petitioner's refusal (Br. 82).

[4] The only evidence of petitioner's knowledge of the Subcommittee's purpose appears in his repeated protests that the list was desired for black-listing purposes. Since the government vehemently repudiates this charge (Br. 53), we can assume that it does not rely upon what petitioner said at the hearing as any evidence of his knowledge.

The inference which the government seeks to draw from petitioner's failure to compile the list in advance is far-fetched and unwarranted. This is not a case like *Bryan* v. *United States,* 339 U.S. 323, where the witness argued that it was necessary for a quorum to be present to witness a refusal to comply with a subpœna. Nor can petitioner's position be properly analogized to the cases cited by the government (Br. 83-84) of witnesses who declared in advance that they would not comply with the subpœna at any time no matter what the ruling authority declared.

Petitioner's position was not one of flat defiance no matter what. His failure to compile the list in advance merely went to the precise due date of a demand which on its face appeared to be onerous and extravagant and to which he had no effective opportunity to object before the due date. Petitioner was in a position to produce the list within a reasonable time if the events at the hearing called for production. It was unreasonable to expect the petitioner to go to the expense and trouble of compiling a list of 35,000 names and addresses prior to presenting his objections to the Subcommittee. On the other hand, it was quite reasonable for petitioner to expect that the Subcommittee would withdraw its unprecedented and startling demand once it heard petitioner's objections. Nor was it unreasonable for petitioner to anticipate that the Subcommittee would have a quorum to consider his objections, to apprise him of the subject under inquiry and of the pertinency of the list, and then, if it still insisted on production, to allow time (as in fact it did) for its compilation after the hearing. Implicit in the government's position is the premise that no one could possibly assume that the Subcom-

mittee might act in a reasonable and responsible manner.

The fact is, however, that it is not appropriate to make petitioner's liberty depend upon speculations as to what he would have done if the Subcommittee had acted otherwise than it did. The key question is not whether petitioner had the list ready for production, but whether he had a legal duty to produce it. Under *Watkins* and *Quinn*, once he objected to the absence of a quorum and to the propriety and pertinency of the demand, he had no duty to produce unless and until a quorum overruled his objections and the Subcommittee explained pertinency. The Subcommittee, however, did none of these things and it is futile to conjecture what the petitioner might have done if those requirements had been met.[5] This Court did not engage in such conjecture as to how the witnesses in *Quinn* or *Watkins* might have behaved if the committees involved had met the procedural requirements of those cases. See also *Bart* v. *United States*, 349 U.S. 219.

Nor is there any merit to the government's position that petitioner cannot avail himself of the events at the hearing because these did not constitute the "true basis" for his refusal. A witness, in the first instance, must always base his objections on some grounds other than a failure to rule on objections or to inform of pertinency, such as that the question or demand is improper, or impertinent. Logically, it is impossible for him to base his refusal on the ground that the

[5] If one must speculate, it is quite possible, as noted by Chief Judge Edgerton below (R. 113), that a quorum might have granted petitioner's request and withdrawn the demand for the membership list.

committee has not overruled his objection or explained the pertinency of the question. Unless the witness has a valid or at least an arguable objection to producing records or answering questions, the situations in *Quinn* and *Watkins* cannot arise. Neither in *Quinn* nor *Watkins* were the events at the hearing the "true basis" for the witness' refusal to answer questions. In *Quinn*, the basis was the First and Fifth Amendments, and in *Watkins*, the lack of pertinency of the questions. Yet in both cases, the Court held that the conduct of the committee in failing properly to consider these objections constituted a defense to the charge of contempt. The present case is indistinguishable.

Respectfully submitted,

DAVID REIN
JOSEPH FORER

FORER & REIN
711 - 14th Street, N. W.
Washington, D. C.

Attorneys for Petitioner